80-1068

No.

Supreme Court, U. S.
FILED
DEC 26 1980
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SUPREME COURT OF THE UNITED STATES

October Term, 1980

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - Petitioner

versus

STEWART MECHANICAL ENTERPRISES, INC., and
JAMES E. SMITH & SONS, INC., and
OTHER UNNAMED CONSPIRATORS - Respondents

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Under *Illinois Brick* principles, does the direct buyer (general contractor), having knowledge or reason to have knowledge that its subcontractors conspired to fix prices on subcontract work, have a duty to the owner (indirect buyer) to disclose such pre-bid information or decline to deal with the price fixers, the violation of which duty renders the direct buyer a co-conspirator and joint tort feasor with the subcontractors?

2. Does a complaint against subcontractors sounding in the violation of the Sherman and Clayton Acts which states that "various firms, corporations, and individuals engaged in the business of providing mechanical contracting supplies and services in the Louisville market, not made Defendants in this action, participated as co-conspirators in the violations" also include general contractors as joint tort feasors and for purposes of alleging a vertical conspiracy?

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Statutes:

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SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - - - *Petitioner*

v.

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC., and OTHER UNNAMED CONSPIRATORS - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Jewish Hospital Association of Louisville, Kentucky, Inc., petitions for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. D, pp. 12a-25a) is reported under the style "Jewish Hospital Association of Louisville, Kentucky, Inc. v. Stewart Mechanical Enterprises, Inc., and James E. Smith & Sons, Inc.", 628 F. 2d 971 (6th Cir; August 29, 1980).

The Opinion of the District Court (App. A, pp. 1a-9a) is not known to be reported.

JURISDICTION

The Judgment of the Court of Appeals (App. E, p. 26a) was entered August 29, 1980. The Order denying the timely Petition for Rehearing (App. F, p. 27a) was entered September 29, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Sherman Act, Section 1, 15 USC § 1, provides:

"§ 1. Restraint of trade; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." (As amended Dec. 12, 1975, P. L. 94-145, § 2, 89 Stat. 801.)

The Clayton Act, Section 4, 15 USC § 15, provides:

"§ 15. Suits by persons injured; recovery of treble damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district

court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.)

STATEMENT

Jewish Hospital Association, Petitioner herein, initiated an action for treble damages against Stewart Mechanical Enterprises, Inc., James E. Smith & Sons, Inc., and Other Unnamed Conspirators in the United States District Court for the Western District of Kentucky alleging the Respondents conspired to fix the price of mechanical (plumbing, heating, air conditioning, and sheet metal) subcontract work on the 1970 Wheeler Addition to the Jewish Hospital. No discovery was taken in this action. After this action commenced, the Supreme Court rendered its decision in *Illinois Brick Company, et al.* v. *State of Illinois,* 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (June 9 1977), rehearing denied, 434 U. S. 881, 54 L. Ed. 2d 164, 98 S. Ct. 242 (1977). *Illinois Brick* holds that a direct purchaser only may maintain an action for damages under the mentioned statutes. On the basis of the *Illinois Brick* decision and discovery in a companion case filed by the Jewish Hospital Association against certain of the general contractors bidding the Wheeler Addition, the District Court sustained a Motion for Summary Judgment of the Respondents, Stewart

Mechanical and James E. Smith. The companion case styled "Jewish Hospital Association of Louisville, Kentucky, Inc. v. Struck, Inc., et al." is still pending in the District Court.

Petitioner herein appealed the decision of the District Court to the Sixth Circuit. Respondents herein filed a Cross-Appeal on an issue of limitations which was decided in the Jewish Hospital Association's favor in the District Court. The Sixth Circuit affirmed the Judgment of the United States District Court on the *Illinois Brick* issue and did not decide the limitations issue.

The Opinion of the Sixth Circuit contains a statement of the case based on the Record on Appeal. This statement is acceptable to Petitioner. In the interest of brevity and accuracy, the Court is respectfully referred to that portion of the Opinion of the Sixth Circuit contained in the Appendix to this Petition.

The Sixth Circuit decided three *Illinois Brick* exceptions against the Petitioner, the controlled purchase/seller issue, a pre-existing cost-plus contract issue, and a vertical conspiracy issue. Petitioner believes that the Sixth Circuit erred on all three points. However, this Petition is limited to the vertical conspiracy issue which is covered in Section II C of the Sixth Circuit's Opinion, pp. 24a to 25a of the Appendix.

The vertical conspiracy issue was raised in the District Court by a Motion to Consolidate the action against the mechanical subcontractors with the companion action against the general contractors. This

Motion was filed after Respondents herein filed their Motion for Summary Judgment based on *Illinois Brick*. The Motion to Consolidate stated that the architects on the project published a list of nine mechanical contractors approved to bid, that Stewart Mechanical and James E. Smith were the only mechanical contractors which submitted bids to any general contractors bidding the project, that the mechanical work constituted approximately one-third of the project, that the general contractors submitted bids on the project which included amounts for mechanical subcontract work, alleged to be determined without sufficient competition and of a collusive nature, and that the general contractors having knowledge or having reason to know there was insufficient competition for the mechanical work thereby participated in the alleged wrongful actions of the mechanical subcontractors. The District Court overruled the Motion to Consolidate.

On appeal to the Sixth Circuit the Petitioner herein raised an issue based on a vertical conspiracy between the general contractors and the mechanical subcontractors, which vertical conspiracy, if proven, would make the general contractors and mechanical subcontractors direct sellers of the price fixed items. The Sixth Circuit held that this argument was not sustainable under the pleadings since there was no vertical conspiracy alleged as such. The Court stated that the separate Complaints each stated horizontal conspiracies.

The pleading in the mechanical contractors' case states as follows:

"III. CO-CONSPIRATORS

6. Various firms, corporations, and individuals engaged in the business of providing mechanical contracting supplies and services in the Louisville market, not made Defendants in this action, participated as co-conspirators in the violations hereinafter charged and performed acts and made statements in furtherance thereof."

The pleading in the general contractors' case states as follows:

"1.6 UNNAMED CO-CONSPIRATORS.

Upon information and belief, other persons, firms, corporations and/or entities (hereinafter 'Unnamed Co-Conspirators') presently unknown to Plaintiff, participated with the named Defendants in the illegal acts and practices hereinafter set forth and the Plaintiff hereby requests leave of Court to amend this pleading when the identity of such Co-Conspirators be ascertained by the Plaintiff, in the course of discovery herein."

The Petitioner filed a Petition for Rehearing in the Sixth Circuit, pointing out to the Sixth Circuit that the pleading in the mechanical contractors' case, the within Appeal, alleges conspiracy between the Respondents named in the case and unnamed co-conspirators who are "providers" of mechanical contract services. The general contractors were "providers" of the mechanical contract services. Thus, the pleadings and Motion to Consolidate covered the issue raised on appeal. See *Gas-a-Tron of Arizona* v. *American Oil*

Co., 1977-2 CCH Trade Cases ¶ 61,789 (D.C. Ariz.; 1977).

It is believed that the issue raised by this Petition *infra* is important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision.

REASONS FOR GRANTING THE WRIT

The issue raised below and by this Petition is as follows:

Does a general contractor, direct buyer, having knowledge or reason to have knowledge that subcontractors conspired to fix prices on subcontract work, have a pre-bid duty to the owner to disclose such knowledge or to act against its subcontractors, the violation of which duty renders the general contractor and subcontractors co-conspirators and joint tort feasors?

The declared purpose of this Court in *Illinois Brick* is the implementation of private enforcement of the anti-trust statutes. Considering the astonishing volume of anti-trust litigation reflected in reported decisions, there is a high incidence of anti-competitive activity in the business world. The duty on each participant in the business world is not limited to its avoidance of anti-competitive activity. Members of the business world have a duty to their customers not to knowingly pass on rigged prices on peril of becoming a party to the wrongful act. This requirement of vigilance of all participants in a contracting trans-

action will enhance voluntary compliance with the anti-trust laws.

On the issue of the pleadings, it is submitted that the general contractors were "providers" of mechanical contract services and included in the alleged "unnamed co-conspirators." If these general contractors were not named parties to the within action, they were by their breach of duty joint tort feasors with the named Defendants. The pleadings covered the issue without resort to the rule of liberal construction. It is well settled that a plaintiff may sue any one or more of the joint tort feasors in an anti-trust claim. See *Leh* v. *General Petroleum Corp.,* 382 U. S. 54, 86 St. Ct. 203, 15 L. Ed. 2d 134. On Petition for Rehearing in the Sixth Circuit, the Petitioner directed that Court's attention to the pleadings and to the right of the Hospital to sue one or more joint tort feasors. Nevertheless, the Sixth Circuit left intact its Opinion which stated that the pleadings did not cover the issue. It is submitted that the Sixth Circuit should not have left intact an opinion which indicated error in pleading on the part of the Hospital.

CONCLUSION

It is believed that this Petition, if granted, will present to the Court a principle which will afford indirect buyers the protection which will result from the enunciation of a duty of vigilance on the direct buyer, or, in the alternative, a duty not to knowingly pass on an illegally fixed price.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. C 76-0430 L(A)

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC., - - - - - - *Plaintiff,*

v.

STEWART MECHANICAL ENTERPRISES, INC., Et Al., - - - - - - - - - *Defendants.*

MEMORANDUM OPINION—Entered May 4, 1978

This antitrust action is submitted to the Court on the motions of the defendants for summary judgment, based primarily on the ruling of the Supreme Court in *Illinois Brick Company* v. *Illinois,* 431 U. S. 720 (1977) and on the alleged running of the statute of limitations.

The undisputed evidence, as developed by discovery and by the pleadings, reflects that on May 24, 1970, the plaintiff received bids from general contractors with respect to plans and specifications for additions to the Jewish Hospital. On June 24, 1970, an agreement was reached between the general contractor and the plaintiff for the construction, with the work to be completed within 930 days.

On May 22, 1972, defendant James E. Smith and Sons, Inc. was indicted for antitrust violations in this Court, Criminal Action No. 27837, but defendant Stewart Mechan-

ical Enterprises, Inc. was not indicted. A civil action was also filed by the United States against defendant James E. Smith and Sons, Inc. on the same date as the indictment was returned. Again, Stewart Mechanical Enterprises, Inc. was not named as a defendant.

On September 27, 1972, a bill of particulars was filed by the United States in the action against James E. Smith and Sons, Inc. and others not mentioning the Jewish Hospital project. Stewart Mechanical was named as a co-conspirator in the bill of particulars. On February 16, 1973, James E. Smith and Sons, Inc. were sentenced in the criminal action pursuant to their *nolo contendre* plea, and on September 13, 1973, final judgment was entered against Smith and Sons in the civil action.

Criminal indictments were returned against Patrick M. King and George F. Duthie, Vice President and President of Stewart Mechanical, alleging perjury in their testimony before the Grand Jury, which returned the indictment against James E. Smith and Sons, Inc. and others, entitled *United States of America* v. *Clark Mechanical Enterprises, et al,* Criminal Action No. 27837. The transcript of proceedings in *United States of America* v. *Patrick M. King,* No. CR 28264, Volume 4(a), pp. 654-655, contained a brief reference to the complementary bidding on the Jewish Hospital project. King and Duthie were both acquitted by jury verdicts, the first verdict being on July 26, 1974 and the second one on May 1, 1975.

Plaintiff paid the general contractor its final payment of $708,619.55 on August 7, 1974.

On November 18, 1975, a criminal indictment was returned against Stewart Mechanical, No. CR 75-0265L, and a civil antitrust action was filed by the Government against the same defendant, No. 75-0377L(A). Two days later a civil antitrust action and a criminal antitrust action were filed by the United States against general contractors, in-

cluding defendants Whittenberg Engineering and Construction Company, Inc. and Struck, Inc., bidders on the Jewish Hospital project.

On March 8, 1976, the United States filed a proposed bill of particulars in the criminal antitrust action against Stewart describing unlawful conduct by it and listing as unlawful activity the Jewish Hospital project of May, 1970, with the known bidders stated to be James E. Smith and Sons, Inc. and Stewart Mechanical. Also, on that date, the United States alleged that James E. Smith and Sons had participated in offenses charged in the indictment.

On March 8, 1976, a proposed bill of particulars was filed by the United States in its criminal action against the general contractors describing unlawful bidding practices and listing as a bid situation evidencing such activity the Jewish Hospital project, with the known bidders stated to be Struck, Inc., Whittenberg Engineering, Glenroy Construction Company and F. A. Wilhelm Construction. On September 24, 1976, plaintiff filed its action against the general contractors and on September 27, 1976 filed this action.

With regard to the statute of limitations question, the parties are in agreement that a plaintiff in a civil antitrust case must bring his action within four years after the cause of action accrued, 15 U.S.C. Sec. 15(b), plus any additional years during which the statute of limitations is tolled. See *Zenith Radio Corporation* v. *Hazeltine Research, Inc.* 401 U. S. 321 (1971). As pointed out in *Zenith,* "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." See 401 U. S. at p. 338. However, "in the context of a continuing conspiracy to violate the antitrust laws, . . . this has usually been understood to mean that each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by

that act and that, as to those damages, the statute of limitations runs from the commission of the act." See p. 338.

The parties are also in agreement that 15 U.S.C. Sec. 16(b) provides for the tolling of the statute of limitations during the period as to which there is pending a suit, either criminal or civil in nature, either by the United States or a private party, against the defendant. See *Zenith, supra,* at p. 335. The parties, however, disagree as to the proper applicability of these sections to the undisputed facts.

Zenith, supra, further holds that Section 16(b) tolls the statute of limitations against all participants in a conspiracy which is the subject of a government suit whether or not they are named as defendants or conspirators. See 401 U. S. at p. 336.

It is apparent that, as to James E. Smith and Sons, Inc., the statute of limitations was tolled during the period May 22, 1972 to September 13, 1973, inasmuch as there was pending during that period a civil antitrust case by the United States against that defendant. It is obvious, also, that the statute was tolled as to Stewart Mechanical during the period May 22, 1972 until February 16, 1973, during which there was pending the criminal action against defendant James E. Smith and Sons, Inc., during the course of which Stewart Mechanical was named as a coconspirator in the bill of particulars.

If we accept the argument made by the defendants that all injuries occurred to the plaintiff on or before June 24, 1970, the date when the general contractor entered into the contract with the plaintiff, then plaintiff would have had a period of four years from that date within which to bring suit, plus the period of approximately sixteen months as to James E. Smith and Sons, Inc., and a period of approximately nine months as to Stewart Mechanical, Inc. It is apparent, as a matter of mathematical calculation that the right to bring an action against James E. Smith and Sons,

Inc. would then have expired in October, 1975, and as against Stewart Mechanical would have expired in March, 1975. However, we do not accept defendants' arguments that the damages accrued to plaintiff as of June 24, 1970 and that no overt act was committed after that date. We believe that each submission of payment by defendants in connection with the Jewish Hospital bid constituted an overt act, and that the right of the plaintiff to establish damages became fixed and certain as of the date that such payments were made.

As stated in *Zenith, supra,* at p. 339:

> "Thus, if a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him to recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date. . . . On the other hand, it is hornbook law, in antitrust actions as in others, that even if injury and a cause of action have accrued as of a certain date, future damages that might arise from the conduct sued on are unrecoverable if the fact of their accrual is speculative or their amount and nature unprovable." (Citing cases).

We do not agree with plaintiff that the indictments against King and Duthie, who were officers of Stewart Mechanical, should be considered as tolling the statute, since those indictments were concerned with perjury and not with violations of the antitrust laws.

Plaintiff insists that the statute of limitation is no bar to its claims in this action, because plaintiff was not aware of its right to sue the defendant until September 27, 1972, when the bill of particulars was filed, which designated Stewart Mechanical as an unindicted coconspirator in the

price-fixing activities occurring in the Falls City area. Defendants, on the other hand, contend that plaintiff should have discovered, well in advance of the filing of the bill of particulars and even in advance of the return of the indictment against James E. Smith and Sons, Inc. in March, 1972, that the defendants were conspiring to fix prices. This argument is based on the theory that since the bids for construction of the addition were 31% in excess of the amounts of the estimated cost of construction, that plaintiff was then put on notice that there might exist a conspiracy to fix prices.

The rule as to the tolling of statutes of limitations in the Sixth Circuit because of fraudulent concealment is found in the case of *Akron Presform Mold Company* v. *McNeil Corporation,* 496 F. 2d 230 (1974). The rule is that there must be ignorance on the part of the plaintiff of one's rights and due diligence in discovering the fraud. See footnote 5, p. 234. Also, it has been held that concealment by the defendant only by silence is not enough, but he must be guilty of some trick or contrivance tending to exclude suspicion and prevent inquiry. See *Arkansas Natural Gas Company* v. *Sartor,* 78 F. 2d 924, 928 (5th Cir. 1935), reaffirmed in *Hickok Producing & Development Company* v. *Texas Company,* 128 F. 2d 183 (5th Cir. 1942).

In the instant case, it is not shown as a matter of law that plaintiff knew of the price-fixing with regard to the project which is the subject of this action, even after the filing of the bill of particulars, although at that time, plaintiff became aware that Stewart Mechanical was named as a coconspirator.

With regard to defendants' argument that it did not fraudulently conceal their price-fixing activities, there is no merit to such contention. Price-fixing is an illegal activity which subjects participants in it to treble damages in civil suits and to criminal penalties, including imprison-

ment up to one year for the participants who are found guilty. Under no stretch of the imagination could it be held that defendants did not fraudulently conceal the nature of their price-fixing activities.

Finally, with respect to the question of due diligence on the part of plaintiff, this is a question of fact. The Court will not rule, as a matter of law, that plaintiff's claim that the statute of limitations is tolled by the fraudulent concealment of the cause of action by defendants should have been discovered prior to September 27, 1972.

The Court has gone into considerable detail in analyzing the statute of limitations problems inherent in this case, even though it is of the opinion that defendants are entitled to summary judgment on other grounds, so as to have presented for the appellate court a full analysis of the limitations problems.

Although plaintiff, under the above reasoning, would be entitled to show any damages suffered by it which accrued within four years after payments are made with relation to the work done and materials supplied by the defendants, the motion for summary judgment must be granted on the basis of the opinion in *Illinois Brick Company* v. *Illinois, supra.* In that case, the Supreme Court, in a six to three decision, held that the State of Illinois and 700 local governmental entities which had entered into construction projects, could not recover antitrust treble damages from masonry contractors who manufacture and sell concrete blocks to masonry contractors who submit bids to general contractors for the masonry portions of construction projects. In reaching that decision, Mr. Justice White, writing for the majority, declined to abandon the principles set out in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corporation,* 392 U. S. 481 (1968) to the effect that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party entitled to recover

damages if injured in his business or property within the meaning of 15 U.S.C. Sec. 15. See *Illinois Brick Company* v. *Illinois, supra,* at p. 729.

In the instant case, the plaintiff is in the same position as the State of Illinois and the 700 local governmental entities were in *Illinois Brick Company, supra.* Its contract is with the general contractor, Wilhelm Construction, and not with the defendants in this action. Its cause of action, under *Illinois Brick,* therefore, is against the general contractor, and not against the mechanical contractor. This is true even though plaintiff approved the list of potential sub-bidders for the general contractor, and even though there is a potential for vertical price-fixing as between general contractors and mechanical contractors.

Cases decided since *Illinois Brick Company, supra,* have uniformly granted summary judgments in cases where plaintiffs were indirect purchasers of either supplies, manufactured goods, or supplies and labor. See *Jackson Park Development Corp.* v. *Bradley Supply Co.,* No. 76-C-4322 (N.D. Ill. June 17, 1977); *Royal Printing Co.* v. *Kimberly-Clark Corp.,* No. C 77-0225-SC (N.D. Cal. July 22, 1977); *In Re Toilet Seat Antitrust Litigation,* Master File No. 75-184 (E.D. Mich. August 24, 1977); *In Re Sugar Antitrust Litigation,* (East Coast), MDL No. 201A (E.D. Pa. September 29, 1977).

Finally, the Court may no longer defer action on the motion for summary judgment because of proposed legislation pending in Congress which is designed if enacted to overcome the effect of the Supreme Court decision in *Illinois Brick Company, supra.* This legislation was introduced July 15, 1977 but is still in Committee.

When the Supreme Court has established a rule of law governing a particular case, the courts are not permitted to delay a decision pending a possible change in the law. See *Federal Deposit Ins. Corporation v. Alker,* 169 F. 2d

336 (3rd Cir. 1948), cert. denied, 336 U. S. 953 (1949), and *In Re Toilet Seat Antitrust Litigation, supra.*

We have this day entered summary judgment for defendants.

Dated 5/4/78

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX B

SUMMARY JUDGMENT—Entered May 4, 1978

Defendants, having filed motions for summary judgment, and the Court, having entered its memorandum opinion and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that defendant's motions for summary judgment be and they are hereby sustained.

This is a final and appealable judgment and there is no just cause for delay.

Dated 5/4/78

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX C

SUPPLEMENTAL ORDER—Entered May 25, 1978

The Court, having noted that its original opinion did not clearly rule on the motion of defendants for summary judgment, insofar as it related to the question of the action being time-barred,

NOW, THEREFORE, IT IS ORDERED that said opinion is supplemented to state on page 6 thereof, after the words September 27, 1972 "in conclusion, we hold that the complaint was timely filed and defendants' motion for summary judgment, based on the alleged running of the statute of limitations, is denied."

Dated May 25, 1978

/s/ Charles M. Allen
United States District Judge

cc: Counsel of Record

APPENDIX D

No. 78-3373-74

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC., - *Plaintiff-Appellant, Cross-Appellee,*

v.

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC., - - - - - - *Defendants-Appellees, Cross-Appellants.*

Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed August 29, 1980.

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. Plaintiff Jewish Hospital Association of Louisville, Kentucky, Inc. (the Hospital) filed this treble damage antitrust action under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22, alleging the defendants, Stewart Mechanical Enterprises, Inc. (Stewart) and James E. Smith & Sons, Inc. (Smith), conspired to fix the price of mechanical (plumbing, heating, air-conditioning and sheet metal) work on the 1970 Wheeler Addition to the Jewish Hospital. Chief District Judge

Charles M. Allen granted summary judgment for the defendants on the ground the suit is barred by the indirect-purchaser doctrine of *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). The Hospital appeals. Stewart and Smith have cross-appealed from Judge Allen's refusal to hold the suit barred by the Clayton Act's four years statute of limitations, 15 U.S.C. § 15b. Because we hold the *Illinois Brick* rule bars the suit, we affirm without reaching the statute of limitations question.

I

In 1970, the Hospital solicited bids from general contractors for the construction of the Wheeler Addition. As required by the bidding procedure, interested general contractors submitted lists of subcontractors from whom they proposed to solicit bids. Joseph & Joseph, the architects, approved nine mechanical subcontractors they considered reputable, including Stewart and Smith, the defendants in this suit.

Five general contractors submitted bids on the project. The low bidder was Wilhelm Construction Company of Indianapolis, Indiana (Wilhelm or the general contractor). Wilhelm's bid of $11,487,844 exceeded the architects' pre-bid estimate by more than $2.3 million, or about 30 percent. Some $3 million of the total bid represented Stewart's low bid on the mechanical subcontract work, a figure about 25 percent above the pre-bid estimate.

In June 1970, Wilhelm was awarded the general contract, subcontracted with Stewart, and began construction of the Wheeler Addition. Construction was completed and the final progress payment was made in August 1974.

In May 1972, Smith and various other mechanical contractors were indicted for price-fixing in the Louisville area. Stewart was named an unindicted co-conspirator. At the

same time, the Government filed a civil action against the criminal defendants. Defendants pleaded *nolo contendere* in the criminal action and entered into a consent decree in the civil action. Smith was sentenced in the criminal case on February 16, 1973 and final judgment was entered in the civil case on September 13, 1973.

On November 18, 1975 the Government filed concurrent civil and criminal price-fixing actions against Stewart, which had been named a co-conspirator but not a defendant in the Government's prior actions against Smith. Two days later, the Government filed similar price-fixing actions against various general contractors, including several that had bid on the Hospital addition. On March 8, 1976 the Government filed bills of particulars in both criminal actions alleging, inter alia, the defendants had engaged in bid-rigging in connection with the Jewish Hospital project. Stewart pleaded *nolo contendere* on August 31, 1977.

Based on the information contained in the Government's complaints and bills of particulars, the Hospital filed two treble damage actions in September 1976 under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22. In *Jewish Hospital Association of Louisville, Kentucky, Inc.* v. *Struck*, No. C-76-0426-L(4) (W.D. Ky.), the Hospital alleged a horizontal conspiracy among various named and unnamed general contractors, including Wilhelm, the successful bidder, to fix prices for the general contracting work on the Wheeler Addition. In the second of the two actions, the case at bar, the Hospital alleged a separate horizontal conspiracy between Stewart and Smith to fix the price of the mechanical subcontracting work on the Addition.

Stewart and Smith answered, denying liability and claiming the suit is barred by the Clayton Act's four-year statute of limitations, 15 U.S.C. § 15b. Subsequently, on July 6, 1977, the defendants moved for summary judgment

on the additional ground the suit is barred by the indirect-purchaser doctrine of *Illinois Brick Co.* v. *Illinois, supra.*

The Hospital responded by arguing the statute of limitations does not bar the action because the defendants fraudulently had concealed their price-fixing. Furthermore, the Hospital argued, the case falls within an exception to the *Illinois Brick* rule. Finally, the Hospital moved to consolidate the action against the general contractors with the case at bar on the ground the general contractors who knew or should have known there was insufficient competition among the mechanical subcontractors became parties to the subcontractors' antitrust violation. The defendants in both cases opposed this motion, and the district court refused to consolidate.

After deferring any ruling on the *Illinois Brick* motion until it became clear that then pending legislation[1] to overrule that case would not become law, the court granted summary judgment for the defendants. The court found the Hospital had contracted for the construction of the Wheeler Addition with Wilhelm which, in turn, had bought all mechanical work from Stewart. This two tier relationship makes the case analogous to *Illinois Brick,* the district court held, and the indirect-purchaser doctrine therefore bars the suit. The court also discussed the statute of limitations issue, but denied summary judgment on the ground that the undisputed facts do not show the suit is time-barred.

The Hospital appeals from the summary judgment for the defendants on the *Illinois Brick* ground. The defendants cross-appeal from the court's refusal to grant summary judgment on the statute of limitations ground.

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[1]*See* S. 1874, 95th Cong., 2d Sess. (June 14, 1978); H.R. 11942, 95th Cong., 2d Sess. (August 11, 1978).

II

In *Illinois Brick,* the State of Illinois and some 700 local governmental entities sued concrete block manufacturers for price-fixing. The plaintiffs argued masonry contractors had paid the artificially inflated price, incorporated the blocks into subcontracted masonry work on public buildings, and passed on the overcharge to general contractors who, in turn, had passed it on to the plaintiffs. Relying on the Supreme Court's earlier rejection of the passing-on defense in *Hanover Shoe Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968), the district court held the plaintiffs could not use a passing-on theory affirmatively to establish damages, and granted partial summary judgment for the defendants. The Seventh Circuit reversed, holding the plaintiffs could recover if they could prove the illegal overcharge had been passed on to them by the direct and intermediate purchasers. The Supreme Court reversed the Seventh Circuit's decision, holding that only the direct purchasers, the masonry contractors, could sue for treble damages under § 4 of the Clayton Act.

The Court articulated two basic reasons for extending the *Hanover Shoe* ban on defensive use of passing-on to cases where indirect purchasers seek to use the pass-on argument offensively to establish damages. First the Court decided it is more efficient to limit damage recoveries under the Clayton Act to direct purchasers of the price-fixed product than to spread that recovery among all the purchasers in the chain of distribution. Under *Hanover Shoe* the brick manufacturers could not assert a passing-on defense against the masonry contractors. Allowing indirect purchaser-plaintiffs to argue that the illegal overcharge had been passed through to them would subject the defendants to the risk of multiple liability. Only by joining all potential plaintiffs as parties to the suit could the multiple liability problem

be eliminated. However, joining all potential plaintiffs would prove difficult or impossible in many cases, particularly where the price-fixed product had been incorporated into consumer goods. Moreover, joining all direct and indirect purchasers in a single suit would transform antitrust actions into massive damage apportionment proceedings whose complexity would increase the overall cost of litigation, diffuse the benefits of bringing a treble damage action, and thereby reduce the incentive to sue. 431 U. S. at 745. Given the longstanding policy of encouraging vigorous private enforcement of the antitrust laws, the Court opted for concentrating the full treble damage recovery at the direct purchaser level.

Second, and more important, determining how much of the overcharge actually had been passed through at each level would be nearly impossible. Even under the simplifying assumptions of economic theory, calculating the amount of the pass-through at any level would involve resolving conflicting expert opinions as to the elasticity of demand for the particular product. Furthermore, because pricing decisions in the real world of imperfectly competitive markets often do not fit an economist's model, theoretical calculations of the amount passed through would only approximate reality. Compounded by the need to repeat the calculations at each level in the chain of distribution, the difficulties and uncertainties of proof would make treble damage actions too complex to be either manageable or effective enforcement mechanisms. Accordingly, the Court held only direct purchasers of price-fixing products may recover in treble damage actions under the Clayton Act.

On its face, *Illinois Brick* seems to bar the Hospital's suit. The price allegedly fixed was the price of the mechanical subcontracting work. The direct purchaser of that work was the general contractor, not the Hospital. Only after the general contractor had incorporated the mechan-

ical work into the finished Wheeler Addition was it resold to the Hospital. To prevail against the defendants, the Hospital would have to prove what portion of the illegal overcharge the general contractor passed on in the form of a higher price for the completed building. *Illinois Brick* seems to prohibit such proof.

The Hospital argues, however, that its suit falls within several exceptions to the *Illinois Brick* rule. First, the Hospital says, the direct purchaser (Wilhelm) was controlled, either by the indirect purchaser (the Hospital) or by the seller (the defendants), so that market forces were superseded and the buyer-seller relationship between the defendants and Hospital effectively was direct. *See Illinois Brick Co.* v. *Illinois, supra,* 431 U. S. at 736 n. 16. Second, since the general contractor purportedly added a fixed percentage markup to the subcontractors' bids, the Hospital argues that its relationship with the general contractor was the functional equivalent of a pre-existing cost-plus contract, another exception to the passing on rule. *See Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra,* 392 U. S. at 494. Finally, the Hospital urges there was a vertical conspiracy involving both the defendants and the general contractors, a situation some courts have found outside the rationale of the indirect-purchaser rule. *See, e.g., Florida Power Corp* v. *Granlund,* 78 F.R.D. 441 (M.D. Fla. 1978). In our view, none of these exceptions applies to this case.

A

The Hospital's first argument takes two alternative forms. As one possibility, the Hospital argues the general contractor was controlled by the defendants. According to the Hospital, it was irrelevant to the defendant mechanical contractors which general contractor was awarded the

Wheeler Addition contract. Stewart and Smith were the only mechanical contractors who bid, and they allegedly conspired to fix their prices. The various general contractors thus were mere conduits for the illegal overcharge, and this fact supposedly brings the case within the rationale of the "control" exception. Alternatively, the plaintiff argues the general contractor was controlled by the Hospital, which found it useful to purchase subcontracting services through an agent rather than directly. According to this argument, the general contractor's task was not to deliver a completed building but to assemble a package of goods and services for the Hospital.

Neither of these theories brings the present case within the rationale of the "control" exception. As examples of situations where an ownership or control relationship between an indirect purchaser and a direct purchaser might make the passing-on bar inapplicable, the *Illinois Brick* Court cited *Perkins* v. *Standard Oil Co.*, 395 U. S. 642, 648 (1969) and *In re Western Liquid Asphalt Cases*, 487 F. 2d 191, 199 (9th Cir. 1973), *cert. denied*, 415 U. S. 919 (1974). In *Perkins*, the Court held the defendant could not avoid liability under the Robinson-Patman Act for price discrimination merely by channelling the illegal discount through its 60 percent-owned subsidiary. In *Western Liquid Asphalt* there was evidence that the defendants controlled their direct customers either by acquiring their stock or by arranging to finance their purchases. Mindful of the *Illinois Brick* Court's emphasis upon the narrow scope of exemptions to the indirect-purchaser rule, 431 U. S. at 745, we read these citations as evidenced that the "control" exception is limited to relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale. *See In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1162 (5th Cir. 1979).

In the present case, the Hospital has alleged no such functional unity. Even if the defendants submitted rigged bids to all the general contractors and were indifferent which one was awarded the contract, this fact does nothing to convert the two-step transaction into the equivalent of a single sale. Compare *In re Sugar Industry Antitrust Litigation,* 579 F. 2d 13, 18 (3d Cir. 1978) in which the court found no *Illinois Brick* problem where manufacturers allegedly fixed the price of sugar which their subsidiaries incorporated into candy purchased by the plaintiffs. *See also Obron* v. *Union Camp Corporation,* 477 F. 2d 542 (6th Cir. 1973), a case in which this court permitted the defendant to assert a passing-on defense against the plaintiff who had sold the defendant's allegedly price-fixed product under what amounted to a commission arrangement. Nor does it help the Hospital to argue the general contractor merely procured services rather than constructed the building. Wilhelms's "package of services" was one of five such "packages" offered to the Hospital. Wilhelm was selected because the overall price of its "package" was lowest. This is a far cry from situations where a purchaser employs an independent broker or purchasing agent to procure a particular good or service. *E.g., In re Toilet Seat Antitrust Litigation,* 1977-2 Trade Cas. ¶61,601 (E.D. Mich. 1977). Neither of the Hospital's theories suggests market forces were superseded. Problems of proving the amount of the pass-on remain undiminished. Accordingly, the "control" exception to the *Illinois Brick* rule does not save this action.

B

The Hospital's second argument is that its relationship with the general contractor was the functional equivalent of a pre-existing cost-plus contract which allowed the general contractor to pass on the full amount of the illegal over-

charge without any loss of sales volume. Specifically, the Hospital says, the general contractor merely solicited bids from subcontractors, added a fixed percentage markup to each, and submitted the total figure as its bid on the Wheeler Addition. Since the general contractor did not have to enter into contracts with the subcontractors until it was awarded the Wheeler Addition contract, the general contractor had nothing to lose by including the entire amount of the overcharge in its bid. By accepting the bid, the Hospital committed itself to buy the entire package, which included the full amount of the illegal overcharge. Accordingly, the Hospital says, the arrangement was the equivalent of a cost-plus contract.

Pre-existing cost-plus contracts are outside the rationale of the passing-on bar. As the Supreme Court recognized in *Illinois Brick:*

> In such a situation, the purchaser is insulated from any decease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price. The effect of the overcharge is essentially determined in advance, without reference to the interaction of supply and demand that complicates the determination in the general case. 431 U. S. at 736.

In other words, because passing on the entire amount of the overcharge cannot decrease its sales, the direct purchaser has no incentive to absorb any of the overcharge itself. This being so, the problem of tracing the overcharge to the indirect purchaser is eliminated.

The Hospital's relationship with the general contractor, however, lacks the essential characteristic of pre-existence that removes the contractor's incentive to absorb part or all of the overcharge. Wilhelm presumably hoped to secure

the general contract on the Wheeler Addition. To do so, it had to submit the lowest bid. Given the need to submit the lowest bid, Wilhelm may have responded to the defendants' unexpectedly high bids on the mechanical work by reducing its profit margin or by taking steps to cut its overall costs. The courts have no way of ascertaining precisely how the general contractor reacted to the defendants' alleged pricefixing. This is exactly the type of uncertainty that caused the Supreme Court to reject a similar passing-on argument in *Illinois Brick:*

> An exception for the contractors here on the ground that they purport to charge a fixed percentage above their costs would substantially erode the *Hanover Shoe* rule without justification. Firms in many sectors of the economy rely to an extent on cost-based rules of thumb in setting prices. See F. Scherer, Industrial Market Structure and Economic Performance 173-179 (1970). These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. *Id.*, at 176-177. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants. 431 U. S. at 744.

Similarly, we find no basis in this case for treating the relationship between the Hospital and the general contractor as an exception to the rule of *Illinois Brick.*

In re Beef Industry Antitrust Litigation, supra, 600 F. 2d at 1164-66, on which the Hospital relies heavily, is not to the contrary. In that case, cattle producers sued supermarket chains for artificially depressing wholesale beef prices by agreeing not to pay more than a fixed price. Because the chains have extensive cold storage facilities and processors do not, the chains could withstand proces-

sors' attempts to withhold beef in order to drive up the wholesale price. The processors' only recourse was to pass on the undercharge by reducing the price they would pay for beef cattle. The plaintiff cattle producers, in turn, were forced to sell at the artificially depressed slaughterhouse price because fattened cattle become less valuable if they are not sold within three weeks of the time they reach choice grade. 600 F. 2d at 1154. Thus, under the allegations of the complaint, the producers' need to sell their cattle effectively insulated the middleman processors from any reduction in their ability to purchase beef cattle, even at artificially low prices. Therefore, the middlemen had no incentive to absorb any of the wholesale undercharge themselves. Because these highly inelastic short-term supply conditions made it simple to calculate the amount of the pass-through, the Fifth Circuit found the rationale of *Illinois Brick* inapplicable and held the plaintiffs had alleged the functional equivalent of a pre-existing cost-plus contract. 600 F. 2d at 1164-65.

The present case, however, includes most of the uncertainties and problems of proof that troubled the Court in *Illinois Brick*. The Hospital's demand for Wilhelm's services was limited by the competing bids: only by underselling its four competitors could Wilhelm secure the contract. Since the general contractor presumably did not know what its competitors would bid, it had an incentive to absorb part or all of the overcharge. This being so, we do not consider the relationship between Wilhelm and the Hospital the functional equivalent of a pre-existing contract. The *Beef Industry* case is distinguishable. *See Eastern Airlines, Inc.* v. *Atlantic Richfield Company,* 609 F. 2d 497, 498 (Tem. Emer. Ct. App. 1979). *Compare Obron* v. *Union Camp Corporation, supra,* 477 F. 2d 542 (6th Cir. 1973) (which allowed a passing-on defense where the middleman had sold for the defendant under what

amounted to a commission arrangement) *with Phillips* v. *Crown Central Petroleum Corp.*, 602 F. 2d 616, 633 (4th Cir. 1979), *cert. denied,* 100 S. Ct. 1021 (1980) (finding no cost-plus equivalent where gasoline retailers were forced to vary their prices in relation to fixed wholesale prices).

C

Finally, the Hospital argues there could have been a vertical conspiracy between the various general contractors and the defendants to fix the price of the mechanical work on the Wheeler Addition. Smith and Stewart were the only mechanical subcontractors to bid on the Addition. Their bids allegedly were rigged. The Hospital argues that any general contractor who knew or should have known the bids were rigged and who incorporated the rigged bids into its own bid calculations became a party to the conspiracy. Under the Hospital's theory, such a general contractor would be jointly and severally liable for the full amount of the overcharge, and the Hospital would not have to assert a pass-on theory to prove its damages.

The problem with this argument is that the Hospital has never pleaded the existence of a vertical conspiracy nor alleged facts sufficient to sustain such an allegation. Instead, the Hospital's complaints alleged two separate horizontal conspiracies, one among the general contractors and the other between Stewart and Smith. Only when the defendants moved for summary judgment under *Illinois Brick* did the Hospital move to consolidate the actions. The motion stated only that some of the general contractors computed their final bids by adding a percentage to the subcontractors' bids and that any general contractor who did so knowing the mechanical subcontract bids were rigged became a party to the illegality. The Hospital has never alleged that any of the general contractors knew the sub-

contractors' bids were rigged nor indicated what facts would have put the general contractors on notice of the defendants' illegal activities. In the absence of such allegations, the Hospital's vertical conspiracy argument impresses the court as a transparent attempt to evade the rule of *Illinois Brick*. *Cf. In re Beef Industry Antitrust Litigation, supra*, 600 F. 2d at 1161-63 (rejecting a similar belated attempt to argue the existence of a vertical conspiracy). Under the circumstances, we need not decide whether proof of knowledge and passing on, without actual agreement, would establish a vertical conspiracy nor whether such conspiracies are outside the rationale of *Illinois Brick*. *See Id.*

We have considered the Hospital's remaining arguments and conclude that they are without merit. Because *Illinois Brick* controls the result in this case, we do not reach the merits of the statute of limitations issue.

The judgment of the district court is affirmed.

APPENDIX E

JUDGMENT—Filed August 29, 1980

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Defendants-appellees, Cross-appellants recover from Plaintiff-appellant, Cross-appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

Entered by Order of the Court.

/s/ John P. Hehman, Clerk

A True Copy.

Attest:

/s/ Gary E. McCarthy, Deputy Clerk

Issued as Mandate: October 8, 1980 (Costs to be awarded to appellees, cross-appellants)

COSTS:

Filing fee	$ 50.00
Printing	$444.00
Total	$494.00

APPENDIX F

ORDER DENYING PETITION FOR REHEARING—

Filed September 29, 1980

Before: KENNEDY and JONES, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Entered by order of the court.

/s/ John P. Hehman, Clerk

No. 80-1068

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - Petitioner,

versus

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC. - - Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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January 28, 1981

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED

Was the court of appeals correct in holding that in order to employ a theory of vertical conspiracy to avoid summary judgment under the indirect purchaser doctrine of *Illinois Brick*, the indirect purchaser in a price-fixing action against remote sellers must specifically plead a vertical conspiracy between the remote sellers and the non-party middlemen and may not merely rely on a pleading of horizontal conspiracy among remote sellers and an allegation that there are or may be unspecified, unnamed co-conspirators who are engaged in the same business as remote sellers (Pet., App. D, 24a-25a)?

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 80-1068

October Term, 1980

JEWISH HOSPITAL ASSOCIATION OF LOUISVILLE, KENTUCKY, INC. - - *Petitioner,*

v.

STEWART MECHANICAL ENTERPRISES, INC., and JAMES E. SMITH & SONS, INC. - - *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

This brief is submitted on behalf of Respondents Stewart Mechanical Enterprises, Inc. ("Stewart"), and James E. Smith & Sons, Inc. ("Smith"), by counsel, in opposition to the petition of Jewish Hospital Association of Louisville, Kentucky, Inc. ("Hospital") for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. In this action for price-fixing under Section 1 of the Sherman Act, 15 U.S.C. §1, the court of appeals' decision affirms the district court's summary judgment for Stewart and Smith, remote sellers to the Hospital, based on the indirect pur-

chaser doctrine of *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977). The Hospital seeks review of only that portion of the court of appeals' decision, part II, C, which holds that absent specific allegations of a vertical conspiracy between the remote sellers and the middlemen, the court need not consider the existence or scope of a "vertical conspiracy" exception to *Illinois Brick* (Pet., App. D, 24a-25a).

Far from presenting this Court with an issue "important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision" (Pet. 7), the Hospital is merely requesting another appellate review of a well-reasoned holding that the Hospital did not properly or adequately raise the vertical conspiracy issue in its pleadings.

Based upon the record in this case, and upon the lack of proper pleading by the Hospital, the conclusion of the district court as affirmed by the court of appeals was wholly predictable and is consistent with all applicable authority. The Hospital's protestations to the contrary notwithstanding (Pet. 7), the court of appeals' holding will not frustrate any legitimate private antitrust action sanctioned by *Illinois Brick* and conducted within the norms of pleading set forth in the Federal Rules of Civil Procedure. The Hospital has failed to demonstrate any justification for certiorari, and the petition should be denied.

STATEMENT

Set forth here are the undisputed facts material to the consideration of the question presented.[1]

I. The Bidding and Contracting for the Construction of the Wheeler Addition to the Hospital.

In 1970 the Hospital solicited bids from general contractors for the construction of a major improvement to its existing facility. This improvement became known as the Wheeler Addition (Complaint, p. 3). Pursuant to the bidding procedure established by the Hospital, several interested general contractors submitted to the Hospital's architects the names of subcontractors in various trades from which they wished to seek subbids. The subbids to be sought from the mechanical contractors were to cover the plumbing, heating, air conditioning and sheet metal services and supplies needed for the construction of the addition. The architects compiled a master list of "approved" subcontractors including the names of nine mechanical contractors, all submitted by the general contractors. Stewart and Smith were among those recommended by one or more general contractors, approved by the archi-

[1]Like the Hospital (Pet. 4), Stewart and Smith accept and commend to the Court the statement of this case contained in the opinion of the court of appeals (Pet., App. D, 12a-15a). Inasmuch as the Hospital limits its petition to the "vertical conspiracy issue" (Pet. 4), this brief will focus on the facts material to that issue and will omit facts material only to the Hospital's abandoned claims (i) that the middlemen were either controlled purchasers or sellers, and (ii) that there was a pre-existing cost-plus contract between the Hospital and the middlemen.

tects and, therefore, solicited by the bidding general contractors (Dep. of Alfred S. Joseph, Jr., pp. 48, 55-58; Letter dated April 17, 1970 from Joseph to Wilhelm with list of approved subcontractors — Exhibits H and L, respectively, to Aff'd. of Alan N. Linker, July 18, 1977).

In May, 1970 both Stewart and Smith submitted mechanical contracting bids to various general contractors who had solicited bids from them. Neither Stewart nor Smith submitted bids to the Hospital. (Aff'd. of George Duthie, July 5, 1977, and Aff'd. of James E. Smith, Jr., July 1, 1977, in Support of Motion for Summary Judgment). Five general contractors then submitted bids to the hospital for the construction of the entire project. These bids included amounts for the mechanical contracting work.[2]

The low bidder among the five general contractors was Wilhelm Construction Company of Indianapolis, Indiana ("Wilhelm") with a bid of $11,843,661. After negotiations between the Hospital and Wilhelm

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[2]On a separate portion of the bid documents set aside by the architect for accounting purposes only, three of the five general contractors listed differing approximate budget amounts to be charged for mechanical contracting services and supplies. The actual mechanical contracting costs to be charged to the Hospital by the general contractors were included and interspersed throughout all sections of the general contractors' bids, and there was no specific accounting for the exact amount represented thereby or for the exact amount which any general might pay to any mechanical contractor for these supplies and services (Tabulation of Bids, Jewish Hospital Additions; Bid Form of F. A. Wilhelm Construction Co.—Exhibits C and B, respectively, to Aff'd. of Alan N. Linker, July 18, 1977).

relating to the selection of alternates to be included in the bid and to the overall price to be charged by Wilhelm to the Hospital, those two parties entered into a construction contract at the firm price of $10,537,637 plus or minus amounts to be added or subtracted because of any changes in the work that might be later agreed upon between the Hospital and Wilhelm. (Dep. of Alfred S. Joseph, Jr., pp. 80-84 — Exhibit O to Aff'd. of Alan N. Linker, July 18, 1977; Aff'd. of Alan N. Linker, March 6, 1978, and attached payment records of the Hospital). Wilhelm thereafter subcontracted the mechanical construction work to Stewart (Aff'd. of George Duthie, July 5, 1977, in Support of Motion for Summary Judgment).

II. The Government's Separate Horizontal Price-Fixing Conspiracy Actions Against the General Contractors and the Mechanical Contractors.

On May 22, 1972, Smith and other mechanical contractors were indicted for horizontal price-fixing in the Louisville area. *United States* v. *Clark Mechanical Enterprises, et al.,* Criminal No. 27837 (W.D. Ky.). The United States also filed a concurrent civil action, *United States* v. *Clark Mechanical Enterprises,* Civil No. 7264-A (W.D. Ky.). Although not named a defendant, Stewart was made an unindicted co-conspirator in a bill of particulars filed in the criminal action. The criminal action ended with *nolo contendere* pleas by all defendants, the last of whom were sentenced on February 16, 1973, and the civil action resulted in a consent judgment entered on September 13, 1973.

On November 18, 1975, the United States commenced against Stewart concurrent criminal and civil actions for horizontal price-fixing with other mechanical contractors. *United States* v. *Stewart Mechanical Contractors, Inc.,* Criminal No. CR75-0265L, Civil No. 75-0377L(A) (W.D. Ky.). The same month the United States commenced similar cases for horizontal price-fixing against certain general contractors in the Louisville area. *United States* v. *Whittenberg Engineering & Construction Co.,* Criminal and Civil Nos. CR75-0266L and C75-0380L(A) (W.D. Ky.). On March 8, 1976, the United States filed bills of particulars in each of the two unrelated criminal cases, stating that there had been both a horizontal general contractors' conspiracy and a horizontal mechanical contractors' conspiracy. The bill of particulars in the general contractors' case identified the Wheeler Addition, among other projects, as one on which the general contractors were alleged to have fixed prices. (Hospital's Memorandum in Opposition to Defendants' Additional (Third) Motion for Summary Judgment, p. 3). These civil and criminal cases commenced in 1975 against Stewart and against the general contractors were concluded with *nolo contendere* pleas and final consent judgments.

Neither the indictments, the complaints, the bills of particulars nor any of the other records in any of these government cases nor any other private action have alleged or supported the existence of any vertical price-fixing conspiracy among any general contractors and any mechanical contractors in the Louisville area.

III. The Hospital's Separate Horizontal Price-Fixing Actions Against the General Contractors and the Mechanical Contractors.

Based on the separate government cases against the general and mechanical contractors, the Hospital commenced two separate treble damage actions in September 1976. In addition to this action, the Hospital also filed *Jewish Hospital Ass'n.* v. *Struck, Inc.*, Civil No. C-76-0426-L(4) (W.D. Ky.). (Complaint, Appendix A to Aff'd. of Irwin G. Waterman, January 24, 1978). In that case, the Hospital named Wilhelm and three of the four other bidders for the general contract as defendants and principals in a horizontal price-fixing conspiracy. In the instant case the Hospital named Stewart and Smith as defendants. Each complaint was paraphrased from and was substantially identical to the government's indictment of the respective building trades. Each complaint alleged the existence of co-conspirators unnamed as defendants (Pet. 6), but neither made any mention of a vertical conspiracy as such. The complaint in this action stated that the co-conspirators were "engaged in the business of providing mechanical contracting supplies and services." (Complaint, p. 2; Pet. 6)[3]

[3]In this case the Hospital did not sue any of the other seven "approved" mechanical contractors which, under the Hospital's apparent theory of price-fixing among the mechanicals, would have had to agree not to bid before any such scheme would have had any chance of success. Nor in *Jewish Hospital* v. *Struck* did the Hospital sue Turner Construction Co., Inc., the high bidder among the general contractors. It was logical to assume that these were unnamed co-conspirators.

Stewart and Smith answered and denied the operative allegations of the complaint. They also raised as a defense the four-year statute of limitations contained in 15 U.S.C. §15b. After this Court's decision on June 9, 1977 in *Illinois Brick,* Stewart and Smith moved for summary judgment on the ground that the Hospital was barred from recovering damages from Smith and Stewart, from which the Hospital was an indirect purchaser. The Hospital had by that time taken the deposition testimony of the chief executive officer of one of the unsuccessful general contractors which was a defendant in the Hospital's other action against the general contractors. The examination was exhaustive but the deposition developed no leads to any vertical conspiracy, nor, for that matter, any evidence of an agreement among the general contractors. Both sides relied upon portions of that testimony on the motion for summary judgment.

While the Court was considering the motion for summary judgment, the Hospital moved to consolidate its two horizontal conspiracy actions against the general and mechanical contractors. Noting in its motion that both cases arose out of the same construction project and that only Stewart and Smith among the nine "approved" mechanical contractors submitted bids to any of the general contractors bidding on the project, the Hospital through its counsel, added the following innuendo:

> Any general contractor having knowledge or having reason to know there was not sufficient compe-

> tition for the mechanical subcontract work on the project and which included such bids in the total of its general contract bid participated in the alleged wrongful actions of the Defendants herein. (Motion to Consolidate, p. 3, July 19, 1977).

On November 2, 1977, in light of the pendency of certain proposed legislation designed to nullify the *Illinois Brick* decision, the district court remanded the motion for summary judgment with leave to renew it if Congress had not enacted such legislation on or before January 2, 1978. In the exercise of its discretion, the district court at the same time denied the motion to consolidate with leave to renew in the event the legislation were enacted.

On January, 3, 1978, no legislation overruling *Illinois Brick* having been passed, Stewart and Smith renewed their motion for summary judgment. Again, the Hospital resisted, filing an opposing memorandum and documents; however, the Hospital continued to eschew discovery regarding a vertical conspiracy and failed to plead such facts as were necessary to allege a vertical conspiracy.

Meanwhile, discovery was proceeding in the Hospital's action against the general contractors. Responding to interrogatories in that action, the Hospital stated that it had found material in its own files and in the files of its architects in connection with the case against the mechanical contractors which indicated that at the time of the bidding the general contractors should have been on notice of "insufficient competi-

tion" among the mechanical contractors. Again, the Hospital intimated that there may have been a vertical conspiracy between the mechanical and general contractors. (Plaintiff's Supplementary Response to Defendant Glenroy's First Set of Interrogatories filed February 10, 1978, in *Jewish Hospital Ass'n.* v. *Struck* and filed as exhibit in this case in support of Defendants' Motion for Summary Judgment on statute of limitations grounds, February 21, 1978).

Thus the Hospital admitted that its own records and those of its architects contained, at the time of the bidding and well within the four-year limitations period, the very information upon which the Hospital now seemed to rely for its claims against Stewart and Smith. For this reason, on February 21, 1978, Stewart and Smith moved for summary judgment against the Hospital on the ground that the statute of limitations had run while the Hospital possessed the knowledge of its claim and before the complaint had been filed. The Hospital resisted this motion as well.

Finally, on May 4, 1978, the district court filed its memorandum opinion (Pet., App. A, 1a-9a) and entered an order of summary judgment (Pet., App. B, 10a). On May 25, 1978, the trial court entered a supplemental order of summary judgment (Pet., App. C, 11a) to clarify and show that the only ground of its original judgment had been the indirect purchaser doctrine of *Illinois Brick* and to show clearly that the court had denied the motion under the statute of limitations. The Hospital appealed to the Sixth Circuit, and Stewart and Smith cross-appealed from the district court's re-

fusal to grant summary judgment on the ground of the statute of limitations. The Sixth Circuit affirmed on the *Illinois Brick* ground without reaching the statute of limitations issue (Pet., App. D. 13a).

At no time after the filing of Stewart's and Smith's original motion for summary judgment in July 1977, despite taking discovery in its case against the general contractors, did the Hospital seek to take discovery of Stewart, Smith or anyone else in the instant case relating to the "vertical conspiracy issue." Neither in response to the summary judgment motion did the Hospital indicate to the district court pursuant to Rule 56(f) of the Federal Rules of Civil Procedure that it was unable to obtain such facts as were needed to oppose the motion. Nor did the Hospital seek to amend its pleadings in this action to plead a vertical conspiracy, either with or without the addition of one or more of the general contractors as parties. The Hospital stubbornly relied on its horizontal conspiracy pleading and its pleading of the existence of unnamed co-conspirators "engaged in the business of providing mechanical contracting supplies and services" (Complaint, p. 2; Pet. 6).

SUMMARY OF ARGUMENT

The decision of this Court in *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977), governs this case. The construction contract bidding format examined in *Illinois Brick* is functionally identical to that revealed in the record here.

The court of appeals' affirmance of summary judgment for Stewart and Smith on the basis of the indirect purchaser doctrine is in accord with the decisions of various district courts and courts of appeals that under appropriate facts and pleadings there may be a third exception to *Illinois Brick* where there is a vertical price-fixing conspiracy and the plaintiff buys directly from one of the conspirators.

This is a case of inadequate pleading. The court of appeals held that in order to raise a "vertical conspiracy" exception to *Illinois Brick* doctrine, a plaintiff must first specifically plead the existence of a vertical conspiracy and that the plaintiff purchased from one of the members of the conspiracy. The court of appeals also held that the Hospital could not rely for this purpose on a mere pleading of horizontal conspiracy and an allegation of the existence of unnamed and unidentified co-conspirators. The court of appeals rejected the Hospital's attempt to make the defendants in one of its horizontal conspiracy cases defendants in another of its horizontal conspiracy cases by moving to consolidate the two under Rule 41 of the Federal Rules of Civil Procedure.

The court of appeals' holding is entirely consistent with the holding and rationale in *Illinois Brick* and with the holdings of the Fifth, Seventh and Ninth Circuits and the district court authority inexplicably relied upon by the Hospital. Moreover, upon remand, the court of appeals would have a separate basis for affirming the summary judgment because the complaint

was filed outside the limitations period prescribed by statute.

REASONS FOR DENYING THE WRIT

Both factually and procedurally this case is functionally identical to *Illinois Brick Co.* v. *Illinois,* 431 U. S. 720 (1977). The multitiered construction bidding mechanism employed by the owners, contractors and suppliers in the *Illinois Brick* case is the same one under which the construction of the Hospital's Wheeler Addition was bid. Where the plaintiff is at least one tier removed from the defendants, a treble damage action arising from the alleged illegal manipulation of this system will inevitably raise the specter of the "insurmountable" task of proving with some certainty the impact of an overcharge passed through the chain of distribution. *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U. S. 481, 494 (1968).

While *Hanover Shoe* forbids the use of the pass-on defense, *Illinois Brick* bars the offensive use of pass-on proof with two very narrow exceptions. The first exception, previously noted in *Hanover Shoe,* 392 U. S. at 494, may apply where the indirect purchaser has a pre-existing cost-plus contract with the middleman, thus eliminating the need for proof of complex market phenomena to show the amount of any pass-on. 431 U. S. at 735-36. The second possible exception raised by this Court in *Illinois Brick* might involve a direct purchaser controlled by its customer. 431 U. S. at 736 n. 16. Citing *Perkins* v. *Standard Oil Co.,* 395 U. S.

642, 648 (1969), and *In re Western Liquid Asphalt Cases,* 487 F. 2d 191, 197, 199 (9th Cir. 1973), *cert. denied,* 415 U. S. 919 (1974), this Court indicated this narrow exception might apply in situations of stock ownership or other actual control through financial arrangements.

The narrow breadth given to the exceptions is consistent with the two reasons the Court gave for its holding in *Illinois Brick* — the complexity of proof and the possibility of multiple, inconsistent and overlapping claims. 431 U. S. at 735-36. The touchstone for application of the exceptions is a determination that the market or pricing mechanism involved in the case eliminates the complexities otherwise inherent in the proof of passing on of price components and substantially eliminates the possibility that the middleman might actually have a claim against the remote seller.

When *Illinois Brick* was decided and Stewart and Smith moved for summary judgment in this case, the Hospital responded by indiscriminately raising every conceivable exception or avoidance of the indirect purchaser doctrine. All were rejected by the district court (Pet., App. A, 8a) and by the court of appeals (Pet., App. D, 18a-25a).

Having dropped for purposes of its petition its claims to the two exceptions recognized in *Illinois Brick,* the Hospital has focused here on what it has

termed the "vertical conspiracy issue" (Pet. 4).[4] The Hospital has admittedly never specifically pleaded a vertical conspiracy (Pet. 4), and Stewart and Smith submit that there never has been in this case any issue of "vertical conspiracy."

I. The Decision of the Court of Appeals Raises No Dispute or Conflict As to the Existence, in a Proper Case, of a "Vertical Conspiracy" Exception to the Indirect Purchaser Doctrine.

The Hospital asks this Court to establish or recognize a new exception to the indirect purchaser doctrine of *Illinois Brick*. Apparently such exception would be designed to allow a plaintiff to recover overcharges from remote sellers with whom the middleman was involved in a vertical price-fixing conspiracy or in a resale price maintenance scheme. In such a case, however, there would be no proof of pass-on because the plaintiff would be proving only the overcharge contained in the last price charged directly to him by a middleman.

We are not aware of any court having decided precisely the issue sought to be raised by the Hospital in this case, *i.e.* as stated by the court of appeals, "whether proof of knowledge [by the middleman of a

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[4] As noted *infra*, p. 17, this issue has been framed by various courts and litigants either (a) as a form of the "control" exception in *Illinois Brick*, (b) as an "unnamed co-conspirator" exception, (c) as simply being outside the ambit of *Illinois Brick*, or (d) as a "vertical conspiracy" exception. For purposes of convenience Stewart and Smith use the Hospital's "vertical conspiracy" terminology throughout (Pet. 4).

remote horizontal conspiracy] and passing on, without on actual agreement, would establish a vertical conspiracy [or] whether such conspiracies are outside the rationale of *Illinois Brick*" (Pet., App. D, 25a). A number of decisions, including one cited by the Hospital and the decision in the court of appeals in this case, have arguably either: (i) reflected the holding or dictum that generally under the right circumstances of pleading and proof (upon the precise nature of which they do not all agree), there may be a "vertical conspiracy" exception to *Illinois Brick;* or (ii) left the question open.[5]

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[5] *Jewish Hospital Ass'n.* v. *Stewart Mechanical Enterprises, Inc.*, 628 F. 2d 971, 977 (6th Cir. 1980), *petition for cert. filed*, 49 U.S.L.W. 3496, (U. S. Dec. 26, 1980) (No. 80-1068); *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F. 2d 323, 327-28 n. 9 (9th Cir. 1980); *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F. 2d 478, 481 (7th Cir. 1980), *rev'g Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 460 F. Supp. 1151, 1158-60 (N.D. Ill. 1978); *In re Beef Industry Antitrust Litigation*, 600 F. 2d 1148, 1161-63 (5th Cir. 1979), *cert. denied*, 101 S.Ct. 281 (Oct. 14, 1980); *Abrams* v. *Interco, Inc.*, [1980-2] Trade Cases (CCH) ¶63,292, p. 75,552 (S.D.N.Y. Apr. 17, 1980); *Reiter* v. *Sonotone Corp.*, 486 F. Supp. 115, 119-21 (D. Minn. 1980); *Technical Learning Collective, Inc.* v. *Daimler-Benz AG.*, [1980-81] Trade Cases (CCH) ¶63,612, pp. 77,253-56 (D.Md. Aug. 28, 1980); *Vermont* v. *Densmore Brick Co.*, [1980-2] Trade Cases (CCH) ¶63,347, p. 75,778 (D.Vt. Apr. 10, 1980); *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1103-04 (D.Md. 1979); *In re Cement and Concrete Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,069, p. 74,639 (D. Ariz. 1978); *In re Anthracite Coal Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,059, p. 74,587 (M.D. Pa. 1978); *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-44 (M.D. Fla. 1978); *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D. N.Y. 1973).

Whether these decisions express the concept as being outside the ambit of *Illinois Brick,* as a vertical conspiracy exception to *Illinois Brick,* as an unnamed co-conspirator exception, or as part of the recognized control exception, they all seem to agree that on proper pleadings and proof of an actual vertical conspiracy, there may be a circumstance under which the rationale of *Illinois Brick* does not apply. For this reason there is no burning disputed issue of law regarding the theoretical or practical efficacy of a vertical conspiracy exception to *Illinois Brick.*

Not one of these cases, however, does what the Hospital has in its second Question Presented asked this Court to do — allow a pleading of horizontal conspiracy to be converted into a pleading of vertical conspiracy merely by the addition of "unnamed co-conspirator" allegations which logically and on their face apply only to the horizontal conspiracy. In fact, as discussed below in part II, each of the four courts which has faced this argument, the Fifth, Sixth, and Ninth Circuits and the District of Arizona, has rejected the notion entirely.

II. The Court of Appeals Was Correct That This Is Merely a Case of Inadequate Pleading by the Hospital and That the "Vertical Conspiracy Issue" Is Not Presented.

Both the district court (Pet., App. A, 8a-9a) and the court of appeals (Pet., App. D, 24a-25a), 628 F. 2d at 977, declined to rule on whether there is a vertical conspiracy exception to *Illinois Brick.* This case did not present the issue because regardless of what facts

the Hospital might have presented in the case to support its theory (and it developed none), the Hospital did not plead a vertical conspiracy. The single case cited by the Hospital for its contention that the motion to consolidate "raised" the vertical conspiracy issue (Pet. 4) and that "the pleadings and the Motion to Consolidate covered the issue raised on appeal" (Pet. 6), holds just the opposite, and is in accord with every case on point not cited to the Court by the Hospital.[6]

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[6]The Hospital cites no authority for its novel position that when two actions not between the same parties are consolidated under Rule 42(a) of the Federal Rules of Civil Procedure, the parties to each action thereby become parties to the other. Prior to the adoption of Rule 42(a), this Court in *Johnson* v. *Manhattan Ry.*, 289 U. S. 479 (1933), held as follows regarding consolidation under the predecessor consolidation statute, 28 U.S.C. §734:

> consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another.
>
> 289 U. S. at 496-97.

Since the adoption of Rule 42(a) these principles of discretion governing consolidation have remained constant, and the rule stated above remains the same. *E.g., Zdanok* v. *Glidden Co.*, 327 F. 2d 944, 950 n. 6 (2d Cir.), *cert. denied*, 377 U. S. 934 (1964). Even in combination with the Hospital's other novel theories, the consolidation motion was inappropriate and would have been ineffective for the Hospital's purpose even if granted in the district court's discretion under Rule 42(a). *See also* 9 Wright & Miller, Federal Practice and Procedure: Civil §2382, p. 255; §2383, pp. 259-62 (1971 & Supp. 1979).

A. The Hospital's Authority.

The case upon which the Hospital inexplicably places great reliance, *Gas-A-Tron of Arizona, Inc. v. American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977), was decided December 7, 1977 during the pendency of this action in the district court, after *Illinois Brick* was decided and while the court had before it Stewart's and Smith's motion for summary judgment based on *Illinois Brick*. In *Gas-A-Tron* the district court outlined to plaintiffs' counsel everywhere the way around the obvious problems created by the application of *Illinois Brick* to pre-*Illinois Brick* complaints.

Inasmuch as theretofore there had been no need to consider the problems of passing on, except as they might have been anticipated as a result of the holding in *Hanover Shoe,* the strategy for antitrust plaintiffs in pending cases was to read into their pleadings and facts not only the two exceptions recognized in *Illinois Brick* but any other conceivable exception which they might invent. The plaintiffs in *Gas-A-Tron* were no different. They had filed a traditional horizontal conspiracy complaint alleging the existence of unnamed and unspecified co-conspirators. As in this case, the complaint was no doubt inspired by, if not copied from, the traditional form of horizontal price-fixing indictment used by the Antitrust Division.

Noting that the definition of a "co-conspirator" in the complaint could not fairly be read to include the middlemen, the court in *Gas-A-Tron* held that such

pleadings could not withstand summary judgment but denied the summary judgment motion on the condition that the plaintiff amend its complaint to conform to the discovery in the case and to show specific allegations of a vertical conspiracy. The court opined that if so amended, the complaint would not require the plaintiff to prove a pass-on theory, and under it the plaintiff would be allowed to prove only that the last price to it was the one fixed. [1977-2] Trade Cases (CCH) at 73,245. The court did not reach the issue of whether the middlemen conspirators would have to be named as parties in the case.

Gas-A-Tron is the only case cited by the Hospital with respect to the "vertical conspiracy issue", yet that decision totally undercuts the Hospital's precarious position. As set forth above in Part I, there are a number of other opinions of which this Court ought to be aware in considering the petition. In addition to the Sixth Circuit in this case, the Fifth, Seventh and Ninth Circuits have been faced with all or part of the issue and have written opinions on the subject. The decisions of these four courts present no conflict to this Court in respect of the record in this case. Each of the other three would have done exactly as the Sixth Circuit has done and would have declined, because of the state of the pleadings and the record, to rule on the existence or scope of a vertical conspiracy exception under the "facts" supposed by the Hospital.

B. The Fifth Circuit Approach.

In *In re Beef Industry Antitrust Litigation,* 600 F. 2d 1148 (5th Cir. 1979), *cert. denied,* 101 S. Ct. 281 (Oct. 14, 1980), the Fifth Circuit, the first court of appeals to address the issue, was presented with the argument that pleadings alleging a horizontal conspiracy among remote price fixers could fairly be read to encompass a vertical conspiracy with middlemen where the complaint also contained reference to the existence of unnamed and unspecified co-conspirators. As in *Gas-A-Tron,* there was nothing specific in the pleadings to show that these unnamed co-conspirators were other than horizontal competitors of the remote price-fixer defendants. The court of appeals noted that "many of the allegations strongly suggest that all the non-defendant co-conspirators are [remote price fixers]." 600 F. 2d at 1160 n. 15. The complaints did plead the existence of a pass-on through the normal operation of the market mechanism but did not plead a vertical conspiracy. 600 F. 2d at 1161. The Fifth Circuit considered the issues and held as follows:

1. The complaint contained "merely an allegation of passing-on, not of [vertical] conspiracy." *Id.*

2. Since (a) there was no prejudgment request for leave to amend the complaint after the decision in *Illinois Brick;* (b) the summary judgment motion which was made on July 17, 1977, eight days after the decision in *Illinois Brick,* was not ruled on until October 1977; and (c) the only request for leave to amend

the complaint was made after the judgment was entered on December 9, 1977; there was no abuse of discretion by the trial court in denying a motion to amend filed at that time. *Id.* at 1161-62.

3. Allegations of vertical conspiracy would not constitute allegations sufficient to raise the narrow "control" exception set forth in footnote 16 to *Illinois Brick*. *Id.* at 1162.

4. There is no exception to *Illinois Brick* for suits alleging vertical conspiracy when "the alleged co-conspirator middlemen are not named as parties defendant." *Id.* at 1163. This ruling is based upon the branch of *Illinois Brick* which sets up the indirect purchaser doctrine to avoid the risk of multiple, inconsistent liability.[7]

C. The Seventh Circuit Approach.

The next Court of Appeals to decide a case on this issue was the Seventh Circuit in *Fontana Aviation,*

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[7]Two district court cases have reached the same result on the basis of the holding in *In re Beef Antitrust Litigation* that the middlemen must be named parties to the litigation in order for any vertical conspiracy exception to apply. *Technical Learning Collective, Inc.* v. *Daimler-Benz AG.*, [1980-81] Trade Cases (CCH) ¶63,612, pp. 77,253-56 (D.Md. Aug. 28, 1980) (motion to dismiss granted where resale price maintenance alleged but middlemen not sued); *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091, 1103-04 (D.Md. 1979) (motion for summary judgment granted where vertical price-fixing conspiracy alleged but middlemen not sued). The Fifth Circuit's opinion also *sub silentio* overruled the decision in *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441, 443-44 (M.D. Fla. 1978), to the extent it may have sanctioned the use of a vertical conspiracy exception without the naming of the middlemen as defendants.

Inc. v. *Cessna Aircraft Co.*, 617 F. 2d 478 (7th Cir. 1980). That case involved claims of damage to an indirect purchaser as a result of vertical price-fixing by a remote manufacturer and its independent distributors and monopoly by the remote manufacturer through the use of its distributors. The trial court applied *Illinois Brick* and granted defendant's motion for summary judgment as to both types of damage claims. *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 460 F. Supp, 1151, 1158-60 (N.D. Ill. 1978). The Seventh Circuit reversed and reinstated the claims noting with respect to the price-fixing claims that the amended complaint specifically alleged that the manufacturer and its independent distributor had conspired vertically to injure the remote purchaser. 617 F. 2d at 479. The court so decided even though the manufacturer was made a defendant and the independent distributor middleman was not. *Id.* at 481[8].

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[8]The conclusion reached in *Fontana* — that there may be a vertical conspiracy exception to *Illinois Brick* where the vertical conspiracy is actually pleaded and even though the middlemen are not sued — has been reached by five different district courts. *Abrams* v. *Interco, Inc.*, [1980-2] Trade Cases (CCH) ¶63,292, p. 75,552 (S.D. N.Y. Apr. 17, 1980) (motion to dismiss denied where resale price maintenance alleged); *Reiter* v. *Sonotone Corp.*, 486 F. Supp. 115, 119-21 (D. Minn. 1980) (summary judgment denied where resale price maintenance alleged); *Vermont* v. *Densmore Brick Co.*, [1980-2] Trade Cases (CCH) ¶63,347, p. 75,778 (D. Vt. Apr. 10, 1980) (summary judgment denied where resale price maintenance alleged); *In re Anthracite Coal Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,059, p. 74,587 (M.D. Pa. 1978) (numerosity of alleged class of plaintiff indirect purchasers not determinable where it is not known whether members of class

(Footnote continued on next page)

D. The Ninth Circuit Approach.

Next the Ninth Circuit confronted the issue in *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F. 2d 323 (9th Cir. 1980). Under *Illinois Brick* the court of appeals affirmed a summary judgment in favor of paper manufacturers, alleged to be horizontal price-fixing conspirators, against the remote purchaser of paper products who bought from middlemen independent wholesalers. The indirect purchaser raised in the court of appeals the theory that "the wholesalers from whom it purchased were the unnamed co-conspirators referred to in the complaint." *Id.* at 327-28 n. 9.

The court pointed out that the plaintiff had opposed summary judgment at the trial court level by merely noting that based on deposition testimony the wholesalers might have been involved and that they

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(Footnote continued from preceding page)
will allege vertical price-fixing conspiracy) (dictum); *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co.*, [1977-2] Trade Cases (CCH) ¶61,789, p. 73,245 (D. Ariz. 1977) (summary judgment denied where amended complaint would allege vertical price-fixing conspiracy); *Donson Stores, Inc.* v. *American Bakeries Co.*, 58 F.R.D. 481, 485 (S.D. N.Y. 1973) (before *Illinois Brick*, intervention of consumers as plaintiffs denied where proposed intervening complaint did not allege vertical conspiracy between existing plaintiff retailers and existing defendant manufacturer). The pre-trial order reported in *In re Cement and Concrete Antitrust Litigation*, [1978-1] Trade Cases (CCH) ¶62,069, p. 74,639 (D. Ariz. 1978), denies summary judgment where there is a question of fact whether middlemen were part of a conspiracy but does not describe the pleadings. The same court, however, had recently decided *Gas-A-Tron of Arizona, Inc.* v. *American Oil Co., supra*, on the theory that the vertical conspiracy must be specifically alleged.

should be classified as "suppliers of paper" under the co-conspirator pleading in the horizontal conspiracy complaint against the remote manufacturers. This is precisely the same as the Hospital's argument that those "engaged in the business of providing mechanical contracting supplies and services" (Complaint, p. 2; Pet. 6) should be read to include general contractors through which mechanical work was bid and the cost passed on to the Hospital.

The Ninth Circuit properly held that a vertical conspiracy allegation was not before the trial court on these pleadings. The Ninth Circuit also noted, as an independent ground for summary judgment, that portion of the decision of the Fifth Circuit in *In re Beef Antitrust Litigation* holding that even when a vertical conspiracy is pleaded to avoid the problems of *Illinois Brick,* the intermediaries must also be named as defendants, not merely as unnamed co-conspirators. *Id.*

E. The Sixth Circuit Approach.

The most recent of the court of appeals decisions on this issue is the one now before this Court. In this case the court of appeals reviewed a record devoid of any pleading of vertical conspiracy or any motion, even a post-judgment motion, for an amendment of the pleadings to reflect a vertical conspiracy. Even after a motion for summary judgment under *Illinois Brick,* even after the decision in *Gas-A-Tron* cited by the Hospital in the trial court, and even after the denial of a motion to consolidate this horizontal case with the horizontal case against the general contractor middle-

men, the Hospital decided to ride out the motion for summary judgment under *Illinois Brick* on the pleadings as they stood prior to *Illinois Brick*.

The Hospital stayed with its innuendo that because only two mechanical contractors bid even though nine were "approved" and that because these bids were allegedly rigged, there *may* have been a vertical conspiracy *if* the middlemen knew of the alleged actions of the mechanicals. Discovery in the case against the general contractors yielded nothing to support this, and the Hospital did not seek to amend its pleadings to reflect its bare supposition. The issue which the Hospital wanted to present, but upon which it had no information and no basis for a pleading, was stated by the Sixth Circuit as follows:

> The Hospital argues that any general contractor who knew or should have known the bids were rigged and who incorporated the rigged bids into its own bid calculations became a party to the conspiracy. Under the Hospital's theory, such a general contractor would be jointly and severally liable for the full amount of the overcharge, and the Hospital would not have to assert a pass-on theory to prove its damages.
>
> 628 F. 2d at 977.

Under the circumstances set forth above, the Sixth Circuit properly disposed of the Hospital's appeal on this point as follows:

> The problem with this argument is that the Hospital has never pleaded the existence of a vertical conspiracy nor alleged facts sufficient to sustain

such an allegation. . . . The Hospital has never alleged that any of the general contractors knew the subcontractors' bids were rigged nor indicated what facts would have put the general contractors on notice of the defendants' illegal activities. In the absence of such allegations, the Hospital's vertical conspiracy argument impresses the court as a transparent attempt to evade the rule of *Illinois Brick*. *Cf. In re Beef Industry Antitrust Litigation, supra,* 600 F. 2d at 1161-63 (rejecting a similar belated attempt to argue the existence of a vertical conspiracy). Under the circumstances, we need not decide whether proof of knowledge and passing on, without actual agreement, would establish a vertical conspiracy nor whether such conspiracies are outside the rationale of *Illinois Brick*. *See Id.*

628 F. 2d at 977.

F. Reconciliation of the Authorities.

The Sixth Circuit has not gone as far as the Fifth and Ninth Circuits did in requiring actual joinder of middlemen co-conspirators as defendants when an indirect purchaser desires to raise a vertical conspiracy exception,[9] but has agreed with the Fifth, Seventh, and

[9]The Sixth Circuit's opinion does not even raise a question as to whether there is an irreconcilable conflict between the rule of the Fifth and Ninth Circuits that a plaintiff must sue all joint tortfeasors in a vertical scheme to avoid *Illinois Brick*, and the rule for which the Hospital cites *Leh* v. *General Petroleum Corp.*, 382 U. S. 54, 63-64 (1965), that generally all joint tortfeasors need not be sued. The Hospital's reference to the latter rule (Pet. 8) is inapposite because the court of appeals did not hold that the Hospital must have sued the middlemen. In any event, these two rules surely could co-exist.

Ninth Circuits that a plaintiff must at least plead the existence of a vertical conspiracy. Moreover, the Sixth Circuit has agreed with the Fifth and the Ninth Circuits and with the District of Arizona in *Gas-A-Tron,* relied upon by the Hospital, that the pleading of a horizontal conspiracy including a paragraph alleging the existence of unknown co-conspirators (at least where the co-conspirators are not specifically alleged to have been the middlemen) will not constitute a vertical conspiracy pleading for the purposes of raising the issue and avoiding the indirect purchaser doctrine.[10]

In the ordinary summary judgment case the issue is the existence or nonexistence of genuine issues of material fact. It is the option of the party opposing the motion to come forward with facts tending to show the existence of an issue of material fact or to present affidavits pursuant to Rule 56(f) of the Federal Rules of Civil Procedure to show why it is then unable to present such facts in affidavit or other suitable form. In this case the Hospital did not even reach that stage —its case contained a much more basic flaw. While it tries in this Court as it tried in the Sixth Circuit to rely upon hints and innuendo of a vertical conspiracy, it never found facts to support a pleading and con-

[10]These holdings are completely consistent with the requirement that a conspiracy be pleaded at least as required under Rule 8 of the Federal Rules of Civil Procedure and perhaps even with the specificity required under Rule 9(b). *See generally,* 5 Wright & Miller, Federal Practice and Procedure: Civil §1233 (1969 & Supp. 1979).

sequently never felt confident enough even to seek the right to amend and plead the elements and facts of such a conspiracy. The court of appeals was absolutely correct in refusing to reach the issue of whether, in a well-pleaded case, there may be a "vertical conspiracy" exception to *Illinois Brick*.

For this reason it is absurd to say, as the Hospital has, that "the issue raised by this Petition . . . is important to the development in the law of the private enforcement of anti-trust claims and a necessary implementation of the *Illinois Brick* decision" (Pet. 7). Similarly, it is obvious that there is no conflict between the decision of the Sixth Circuit and the decision of any other court of appeals on the vertical conspiracy exception which the Hospital tries to employ. Neither is there any departure in the Sixth Circuit's opinion from the accepted and usual course of judicial proceedings.

Finally, even if this case were remanded, the court of appeals would have another ground upon which to deny relief to the Hospital. The complaint was filed approximately two years after the end of the four-year limitations period of 15 U.S.C. §15b, as extended by the 1972 indictments and civil suit until September 1974. (Brief for Defendants-Appellees, Cross-Appellants, pp. 15-21, 37-47, filed October 23, 1978, in the court of appeals). The material facts are already in the record and this issue has been briefed to the Sixth Circuit on Stewart's and Smith's cross-appeal.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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